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APPEAL OF STATE OF ALASKA

3 ANCAB 297

Decided *July 31, 1979*

Appeal of State of Alaska from decision of the Bureau of Land Management F–14909–A.

Affirmed in part, reversed in part and remanded.

1. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Generally

The Board is bound by Secretarial policy and interpretation of law expressed in a Solicitor's Opinion in which the Secretary of the Interior concurred.

2. Withdrawals and Reservations: Generally—Submerged Lands Act: Generally

The Board adopts the Solicitor's conclusion that Public Land Order No. 82 (Jan. 22, 1943) (8 FR 1599 (Feb. 4, 1943)) constituted an express retention for the United States of submerged lands when Alaska was admitted to the Union, and title to the submerged lands withdrawn by PLO 82 did not pass to the State of Alaska with statehood.

3. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Submerged Lands Act: Generally

Regulations in 43 CFR 2650.5–1(b) deal explicitly with chargeability of acreage and implicitly with land title, establishing two categories of submerged lands not required to be selected and charged: those underlying navigable waters, and those underlying nonnavigable waters of one-half section or more.

4. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Submerged Lands Act: Generally

Under regulations in 43 CFR 2650.5–1(b), Federal ownership of submerged lands does not require all such lands to be charged against a Native corporation's acreage entitlement.

5. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Generally

The Secretary, and this Board, are bound by duly promulgated regulations of the Department.

6. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Generally

As between a published regulation applicable to chargeability of submerged land and an unpublished Departmental decision paper applicable to the same issue, the Board is bound to follow the regulation. Therefore, regardless of whether the United States retains ownership of the bed of the Colville River, the Bureau of Land Management must, pursuant to 43 CFR 2650.5–1(b), determine whether the river is navigable and, if it is found navigable, must exclude the riverbed from the acreage to be charged against Kuugpik's entitlement.

APPEARANCES: James Reeves, Esq., and G. Thomas Koester, Esq., Department of Law, on behalf of the State of Alaska; Francis Neville, Esq., Office

of the Regional Solicitor, on behalf of the Bureau of Land Management; James Wickwire, Esq., and David Crosby, Esq., on behalf of Kuugpik Corporation.

OPINION BY
ALASKA NATIVE CLAIMS
APPEAL BOARD

SUMMARY OF APPEAL

The State of Alaska appeals conveyance of land underlying inland waters, the Nechelik Channel of the Colville River, to Kuugpik Corp., on the grounds that the Colville River is navigable and the bed of the stream therefore belongs to the State. Issues raised are: (1) the effect of a Public Land Order (PLO) No. 82 (Jan. 22, 1943) (8 FR 1599 (Feb. 4, 1943)) which withdrew land for military purposes on the ownership of the bed of the Colville River; and (2) whether regulations in 43 CFR 2650.5–1, dealing with chargeability against acreage entitlements of land under navigable and nonnavigable waters, apply to submerged lands withdrawn by PLO 82, which remain in Federal ownership.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 & Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Pursuant to regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, the State Director or his delegate is the officer of the Bureau of Land Management, United States Department of the Interior, who is authorized to make decisions on land selection applications involving Native corporations under the Alaska Native Claims Settlement Act, subject to appeal to this Board.

FACTUAL BACKGROUND

In January of 1943, during World War II PLO 82 (8 FR 1599 (Feb. 4, 1953)) withdrew certain lands in northern Alaska, and the minerals in such lands, for use in connection with the war.

The Submerged Lands Act of 1953 (67 Stat. 29, 43 U.S.C. §§ 1301–1315 (1976)) granted title to certain underwater lands, both inland and off the marine coast, to the states.

The Alaska Statehood Act of 1958 (72 Stat. 339, 48 U.S.C. note preceding § 21) applied the Submerged Lands Act to Alaska, which was admitted to the Union on Jan. 3, 1959. (Proclamation No. 3269 (Jan. 3, 1959) 24 FR 81, 73 Stat. c 16.)

PLO 82 was in effect at the time of Statehood and remained in effect until it was revoked in 1960.

The Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977), withdrew certain public lands in Alaska for selection by, and conveyance to, Native corporations formed under the Act.

Section 3(e) of ANCSA defines public lands as "all Federal lands and interests therein."

The present appeal arose pursuant to ANCSA when Kuugpik Corp. (Village of Nooiksut) selected lands within the area formerly covered by PLO 82.

The selection application specifically excluded lands underlying the Nechelik Channel of the Colville River, on the basis that the river was navigable and title to the river bed was in the State. BLM, in the decision here appealed, found it unnecessary to exclude the lands or to determine the navigability of the river, based on PLO 82. The decision stated:

> No determination of navigability or tidal influence affecting the inland water bodies within the lands herein described is necessary as the lands were withdrawn by Public Land Order No. 82 (43 FR 1796, February 3, 1943) when the Alaska Statehood Act of July 7, 1958 was passed (see 72 Stat. 339, 343; 48 U.S.C. Ch. 2, sec. 6(m) (1970)); therefore, the lands beneath tidal or navigable water bodies did not vest in the State pursuant to the Submerged Lands Act of May 22, 1953 (67 Stat. 29, 32, section 5; 43 U.S.C. Ch. 29, 1313(a) (1970)).

The State appealed, on the grounds that the Colville River is navigable, and that the State of Alaska, under the Submerged Lands Act, holds title to the beds of all navigable streams within its boundaries.

After filing of this appeal, the Board was notified by Kuugpik Corp. and the Bureau of Land Management that the Secretary of the Interior was preparing to issue a decision on the effect of PLO 82 on title to submerged lands in Alaska. The Board therefore extended briefing schedules and on Oct. 18, 1978, suspended briefing pending the Secretarial decision on PLO 82.

The decision was rendered by Secretarial concurrence with an opinion, designated M–36911, prepared by the Solicitor of the Department of the Interior. (*The Effect of Public Land Order 82 on the Ownership of Coastal Submerged Lands in Northern Alaska, Solicitor's Opinion*, 86 I.D. 151 (1978)). [Hereinafter cited as *Solicitor's Opinion* M–36911.]

This opinion concluded that coastal submerged lands were not withdrawn by PLO 82, but that inland submerged lands were withdrawn and, therefore, title to inland submerged lands did not pass to the State of Alaska upon admission to the Union.

Upon inquiry by the Board, the Secretary of the Interior notified the Board by letter dated Feb. 23, 1979:

> Re: Appeal of State of Alaska from Decision of Bureau of Land Management F–14909–A (Kuugpik Corporation), ANCAB Decision VLS 78–32
>
> On December 12, 1978, the Solicitor rendered an opinion on 'The Effect of Public Land Order 82 on the Ownership of Coastal Submerged Lands in Northern Alaska' in which I concurred. My concurrence on this matter established Departmental policy and our legal position on the issues addressed in that memorandum. Accordingly, I direct you to apply that opinion in the referenced case

as well as in any other cases posing the same policy and legal issues.

With regard to other pending factual and legal issues, your Board should conduct appropriate proceedings and render a decision.

The Board notified the parties of the Secretary's response and reopened briefing.

Kuugpik Corp. then filed a brief, arguing that regardless of whether the United States retains ownership of the beds of these inland navigable waters, the decision of the Bureau of Land Management in this case must be reversed because 43 CFR 2650.5–1(b) requires BLM to exclude the beds of all navigable bodies of water from the acreage to be charged against Native entitlements.

Thus, this appeal presents two basic issues. The first, raised at the outset by the State, is: Does the State of Alaska own inland submerged lands under navigable waters, within the area withdrawn by PLO 82?

The second issue, raised by Kuugpik after issuance of *Solicitor's Opinion*, M–36911 on PLO 82, is: Do regulations in 43 CFR 2650.5–1 (b) require BLM to exclude the beds of all navigable waters within a Native corporation's selection when title to the submerged bed is retained in Federal ownership?

The first issue deals with land ownership, while the second deals with chargeability of acreage. The first issue is resolved by *Solicitor's Opinion*, M–36911; the second is not. For reasons to be discussed herein, the Board finds that: (1) the State does not own inland submerged lands under navigable waters within the area withdrawn by PLO 82; and (2) the acreage of such lands, retained in Federal ownership because of PLO 82, cannot be included in a Native corporation's selection or charged against their acreage entitlement unless the waters above such lands are determined to be nonnavigable pursuant to regulations in 43 CFR 2650.5–1 (b).

OWNERSHIP OF SUBMERGED LANDS

The State claims title to inland submerged lands under navigable waters, within the area withdrawn by PLO 82. BLM concluded that PLO 82 prevented title to the bed of the Colville River from vesting in the State, regardless of the navigability of the river, and so made no finding on navigability.

The State denies the applicability of PLO 82 to inland submerged lands under navigable waters. The State argues that PLO 82 affects "public lands" and lands under navigable waters are not public lands; that PLO 82 withdrew lands from the operation of public land laws, but that the Statehood Act was not a public land law; and that PLO 82 was in support of the war effort and lapsed at the end of World War II.

The State contends that the Statehood Act and the Submerged Lands Act, granting the State title to lands under navigable waters, supersede a public land order; if this were not so, the National Defense withdrawal north of the Porcupine-Yukon-

Kuskokwim line, contained in the Statehood Act, would be unnecessary.

The State argues that § 11(b) of the Statehood Act maintained Federal legislative jurisdiction over military withdrawals, but did not affect title to the withdrawn lands. Alternatively, title vested in the State immediately upon revocation of PLO 82 in 1960, because the State received title under the equal footing doctrine in lands under navigable waters held in trust for the future State; because the Act of May 14, 1898 (30 Stat. 409, 43 U.S.C. § 942–1 (1976)), expressly reserved the beds of navigable waters for the State of Alaska; and because § 11 (b) of the Statehood Act left exclusive legislative jurisdiction over military lands in the United States only so long as the lands were used for military purposes.

The Solicitor, in *Opinion* M–36911, reaches a different result. He discusses whether references in PLO 82 to the public lands of Alaska could include coastal and inland submerged lands. The Solicitor states:

> * * * it is apparent that the question of whether the public lands in Alaska could include inland or coastal submerged lands has continued to turn on the language and purpose of the specific withdrawal at issue * * *.
> [*Solicitor's Opinion*, M–36911, 86 I.D. 151 at 159.]

After finding that coastal submerged lands were excluded from PLO 82, the Solicitor discusses the purpose of the withdrawal and then considers whether inland submerged lands were included.

> * * * PLO 82 was directly related to prosecution of World War II. * * * exploration and development of an Alaskan oil and gas supply were needed for the war effort. As private industry had not developed an oil and gas field in Alaska under the Mineral Leasing Act, the Federal Government was considering engaging in an oil and gas exploration program in an attempt to secure a source of oil for the armed forces. In order to protect the potential exploration area from interference by private claimants and lessees, it was considered necessary to withdraw the lands for exclusive federal use. * * *
> [*Solicitor's Opinion*, M–36911, *supra*, at 165.]

The Opinion concludes on page 169:

> Given the state of technology, I believe it was reasonable for the drafters of PLO 82 to perceive some threat of interference to drilling in the uplands, including in and around inland waters, but much less reason to perceive a threat of interference from private drilling in coastal submerged lands. To this extent, given the urgency of the war effort and the purpose of the 1943 withdrawal to protect federal petroleum exploitation, I believe it would have been reasonable for the drafters of PLO 82 to perceive some threat of interference to drilling in the beds of inland navigable waters, and therefore conclude that, to effectuate fully the important purpose of the Order, *inland submerged lands were intended to be included.* * * * [Italics added.]

The Solicitor then considers the impact of the Submerged Lands Act and the Alaska Statehood Act, *supra*, which provided in § 6(m):

> The Submerged Lands Act of 1953 * * * shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.

The Solicitor states:

> Except for section 5(a) of the Submerged Lands Act, the coastal submerged lands or those underlying inland navigable waters would unquestionably have passed to the State upon its admission to the Union. However, sec. 5(a) (43 U.S.C. § 1313(a) (1970)), excepts from the grant to States
>
> "all lands expressly retained by * * * the United States when the State entered the Union (otherwise than by a general retention * * * of lands underlying the marginal sea) * * * and any rights the United States has in lands presently and actually occupied by the United States under claim of right."
>
> If either of these exceptions to the broad statutory grant applies, the Submerged Lands Act is prevented from operating through the Statehood Act to relinquish the submerged lands to Alaska.

[*Solicitor's Opinion*, M-36911, *supra*, at 171.]

The Solicitor concludes that PLO 82 constituted an express retention of the submerged lands for the United States when Alaska entered the Union in 1958, and therefore prevented title to the submerged lands withdrawn by PLO 82 from passing to the State upon statehood.

Finally, the Solicitor considers the effect of revocation of PLO 82 in 1960 as follows:

> The final question is whether the State automatically gained title to the lands upon revocation of PLO 82 in 1960, one year after statehood.
>
> The short and complete answer to this contention is that it is foreclosed by the express language of section 5(a) of the Submerged Lands Act, which exempts from transfer '[a]ll lands expressly retained by * * * the United States *when* the State entered the Union * * *.' 43 U.S.C. § 1313(a) (Italics added.) The exception operates at a fixed point in time; namely, upon statehood. The inclusion of this cause implies that if this exception is applicable at the time of statehood, it constitutes a permanent retention by the United States of those submerged lands. Thus, the subsequent revocation of PLO 82 did not divest the United States of title to the submerged lands withdrawn by PLO 82. The revocation of PLO 82 might allow the State of Alaska to select these submerged lands as part of their entitlement under the Statehood Act, subject to federal approval as required by that Act. But mere revocation of the Order could not have automatically transferred title to the State.

[*Solicitor's Opinion*, M-36911, *supra*, at 174.]

[1, 2] As to the State's asserted ownership of lands underlying the Nechelik Channel of the Colville River, the Board is bound by Secretarial policy and interpretation of law as expressed in the above-cited Solicitor's Opinion in which the Secretary concurred. The Board therefore adopts the Solicitor's conclusion that PLO 82 (8 FR 1599 (Feb. 4, 1943)) constituted an express retention for the United States of submerged lands when Alaska was admitted to the Union, and title to the submerged lands withdrawn by PLO 82 did not pass to the State of Alaska with statehood. Therefore, the Board hereby affirms that part of the decision of the Bureau of Land Management which denies the State's title to the disputed submerged lands.

EFFECT OF REGULATIONS ON ACREAGE CHARGED TO KUUGPIK

The Secretary's concurrence with *Opinion* M–36911 has established that title to the riverbed is in the United States, regardless of the navigability of the Colville River. The question is whether Kuugpik is now required to include the riverbed in their land selection, and subtract the acreage of the riverbed from the total acreage they are entitled to receive without regard to whether the river is navigable. The emphasis of this issue is on chargeability of acreage against Kuugpik's entitlement, according to a published regulatory scheme, rather than on land title.

Kuugpik asserts that, regardless of the ownership of the riverbed, published regulations of the Department require BLM to determine navigability of the Colville River and, if it is found navigable, not to charge the acreage of the riverbed against Kuugpik's entitlement. Kuugpik relies on the binding effect of regulations promulgated under the Administrative Procedure Act (60 Stat. 237, *as amended*, 5 U.S.C. § 553 (1976)), and argues that such regulations must be adhered to by BLM and the Board until revoked or amended through rule-making procedures. The Board agrees.

Kuugpik bases its position on language in 43 CFR 2650.5–1:

> General.
>
> (a) Selected areas are to be surveyed as provided in section 13 of the act. Any survey or description used as a basis for conveyance must be adequate to identify the lands to be conveyed.
>
> (b) *Surveys shall take into account the navigability or nonnavigability of bodies of water. The beds of all bodies of water determined by the Secretary to be navigable shall be excluded from the gross area of the surveys and shall not be charged to total acreage entitlements under the act.* Prior to making his determination as to the navigability of a body of water, the Secretary shall afford the affected regional corporation the opportunity to review the data submitted by the State of Alaska on the question of navigability and to submit its views on the question of navigability. Upon request of a regional corporation or the State of Alaska, the Secretary shall provide in writing the basis upon which his final determination of navigability is made. The beds of all bodies of water not determined to be navigable shall be included in the surveys as public lands, shall be included in the gross area of the surveys, and shall be charged to total acreage entitlements under the act. The beds of all nonnavigable bodies of water comprising one half or more of a section shall be excluded from the gross area of the surveys and shall not be charged to total acreage entitlement under the act, unless the section containing the body of water is expressly selected or unless all the riparian land surrounding the body of water is selected. No ground survey or monumentation will be required to be done by the Bureau of Land Management of bodies of water. [Italics added.]

BLM argues that the quoted regulation does not apply in the circumstances of this appeal because title to the beds of navigable waters within the PLO 82 withdrawal did

not vest in the State of Alaska. BLM asserts that the regulation is intended to apply only when it is necessary to determine navigability for purposes of title; *i.e.*, in the more common situation where title to the beds of navigable waters has vested in the State and such submerged lands are not public lands as defined in § 3(e) of ANCSA. Such submerged lands are excluded from conveyances to Native corporations under ANCSA and the acreage of the beds is not charged against the ANCSA land entitlement.

BLM contends that where the riverbed remains in Federal ownership regardless of navigability, it is within the definition of "public lands" in § 3(e) of ANCSA as "all Federal lands and interests therein." These submerged public lands, according to BLM's reasoning, were withdrawn for Native selection by § 11(a) of ANCSA and must be selected as required by § 12(a) of the Act and implementing regulations.

BLM's argument that all submerged public lands must be selected under ANCSA neglects consideration of the fact that the second half of 43 CFR 2650.5–1(b) clearly states that certain submerged public lands need not be selected and charged against entitlement. Regardless of public land status, lands underlying nonnavigable waters comprising one-half section or more are excluded from the gross area of the survey, and are not charged against acreage entitlement unless selected expressly or totally surrounded by selections.

[3] The regulation read as a whole deals explicitly with chargeability of acreage and implicitly with land title, establishing two categories of submerged lands not required to be selected and charged: (1) those underlying navigable waters; and (2) those underlying nonnavigable waters of one-half section or more.

Although the regulation does not expressly state the rationale for these exclusions, the Board agrees with BLM that the first exception—submerged lands underlying navigable waters—is based on the legal premise that title to the beds of navigable waters will be in the State. Under this premise such lands are not in Federal ownership, thus are not public lands within § 3(e) of ANCSA, and cannot be selected by a Native corporation. This legal premise would be correct in most cases. (See Vol. 1, R. Clark, Waters and Water Rights, § 37.2(c) (1967) for the proposition that state ownership of lands beneath navigable waters is the "overwhelming majority rule.")

The second exception—submerged lands underlying nonnavigable waters comprising one-half section or more—represents a compromise between the Departmental position published as proposed rulemaking in March of 1973 and the position of the Alaska Federation of Natives, Inc., expressed as comments to the proposed rules.

The Department's original proposed rulemaking provided that the beds of all navigable water bodies were to be excluded from selections, while beds of all nonnavigable water bodies were to be selected and charged against a Native corporation's entitlement. (43 CFR 2650.5–1(b); 2651.4(c); 38 FR 6506, 6508 (Mar. 9, 1973).)

The Alaska Federation of Natives objected, relying on § 12(a) of ANCSA. AFN's position was that while § 12(a)(1) required village corporations to select all of the township or townships in which any part of a village is located, § 12(a)(2) allowed an exception related to submerged lands as follows:

> Selections made under this subsection (a) shall be contiguous and in reasonably compact tracts, *except as separated by bodies of water* or by lands which are unavailable for selection, and shall be in whole sections, * * * and wherever feasible, in units of not less than 1,280 acres. [Italics added.]

AFN urged that, under this exception and similar language in § 16(b), nonnavigable bodies of water should be meandered, and conveyances upland of the meander line should include the body of water, with no charge against entitlement. (Comments of the Alaska Federation of Natives, Inc. on Proposed Alaska Natives' Selection Regulations, 38 FR 6504, Mar. 9, 1973 (Apr. 16, 1973).) (Unpublished comments transmitted by letter from Edward Weinberg to Burton W. Silcock, Director, Bureau of Land Management.)

In the final published regulations of May 30, 1973, the Department retreated from its position that all federally owned submerged land, *i.e.*, beds of nonnavigable water, must be selected and charged, to the present compromise position that allows exclusion of nonnavigable bodies of water comprising one-half section or three hundred twenty acres. (43 CFR 2650.5–1(b) 2651.4(b).) Such bodies of water are excluded from the area of survey and are not charged against entitlement, even though they meet the definition of public lands in § 3(e) of ANCSA.

BLM has argued that the regulation is applicable only when it is necessary to determine title, and that in this instance, where title has been determined on a basis other than navigability, the regulatory requirement for a navigability determination does not apply.

The Board agrees that navigability cannot be used as a test for State title or public land status in this case. Following *Solicitor's Opinion*, M–36911, the navigability determination contemplated by the regulations is not needed to determine title.

However, left unresolved by *Solicitor's Opinion*, M–36911 is the question of chargeability. Having determined that lands underlying the Nechelik Channel of the Colville River remain in Federal ownership, the *Opinion* is silent on whether or not these lands shall be charged against Kuugpik's entitlement.

[4] From the foregoing discussion it is clear that the Department has interpreted and made public its position on chargeability of federally owned submerged lands through the regulations contained in 43 CFR 2650.5–1(b). It is further clear that under these regulations, Federal ownership of submerged lands does not require all such lands to be charged a Native corporation's acreage entitlement.

BLM suggests that the question of chargeability in this appeal should be decided, not on the basis of the regulation, but rather in accordance with the Department's conclusions, designated ANCSA Issue 8 contained in an unpublished document entitled "ANCSA Implementation and Policy Review, Mar. 3, 1978". (Exhibit A, BLM brief of May 18, 1979.) The issue states: Should the acreage of federally owned submerged lands within the area of a Native corporation's selection be counted against the corporation's entitlement when conveyance is made?

The conclusion was that it should, and that navigable determinations should be made only when necessary to determine whether submerged lands were in State or Federal ownership. The issue paper states, in pertinent part:

NAVIGABLE WATER

Issue:

A. Should the acreage of Federally owned submerged lands within the area of a Native corporation's selection be counted against the corporation's entitlement when conveyance is made?

B. If yes, what procedures should be followed to determine the status of water bodies (navigable or nonnavigable) when necessary to determine State or Federal ownership?

Decision:

A. * * *

2. Where a corporation selects a section of land fronting on or including submerged lands under a water body and the ownership of the submerged land within that section is in the United States, the acreage chargeable against that corporation's entitlement includes such area of submerged lands within that section. The United States retains specific ownership of any remaining submerged lands outside of the section conveyed.

* * * * *

B. The *existing policy* should be continued with improvements sought by:

1. Reviewing land withdrawal status as of January 3, 1959, to identify 'inland' water bodies reserved to the United States at the time of Statehood. Such water bodies would not require a determination of navigability or nonnavigability.

* * * * *

Implementation:

Revise, as necessary, the regulations in 43 CFR 2650, to *clarify* the decision on chargability [*sic*] of submerged lands acreage.

BLM to continue navigability determinations, where necessary, using existing policy and institute improvements in that procedure as specified in the decision above.

Although this policy statement was concurred in by the Secretary of the Interior, it has not as yet been submitted to the rulemaking process and published as regulations.

There is no question here as to whether the Secretary has the authority to change or modify his own policy concerning chargeability of federally owned submerged land;

Kuugpik admits that the Secretary could have promulgated a rule charging Native corporations with the beds of navigable waters where title has been retained in the United States.

However, Kuugpik argues that until such time as the Secretary amends the existing regulations in compliance with the Administrative Procedures Act, the regulation is binding on his subordinates.

[5] The Secretary is bound by duly promulgated regulations of the Department. (*Wilfred Plomis*, 34 IBLA 222 (1978) and cases cited therein.) The Board has previously held it is bound by Departmental regulations. (*Appeal of State of Alaska*, 3 ANCAB 129, 136, 86 I.D. 45, 49 (1979) [VLS 78–43].)

Government agencies must follow their own published regulations, even when a particular decision involves some discretion. Agencies may not publish regulations pursuant to the Administrative Procedure Act while at the same time producing ad hoc unpublished decisions. (*Griffin* v. *Harris*, 571 F.2d 767, 772 (3d Cir. 1978).)

While it is possible to speculate, as the Board has done in the foregoing discussion, about the intent of the current regulation, the wording of the regulation is clear:

> * * * The beds of *all* bodies of water determined by the Secretary to be navigable shall be excluded from the gross area of the surveys and shall not be charged to total acreage entitlement under the act. * * * [Italics added.]
> [43 CFR 2650.5–1(b)]

Both the State and Kuugpik have relied on this regulatory language in the prosecution of this appeal.

[6] Therefore, as between a published regulation applicable to chargeability of submerged lands and an unpublished Departmental decision paper applicable to the same issue, the Board is bound to follow the regulation. The *Solicitor's Opinion*, M–36911, has disposed of the issue of ownership of submerged lands under the Colville River in this appeal. The question of the chargeability of such lands is resolved by regulations in 43 CFR 2650.5–1(b). Although, in connection with ANCSA Issue 8, the Department apparently intends to amend these regulations, they have not yet been amended. The Board remains bound by the current regulation. Therefore, regardless of whether the United States retains ownership of the bed of the Colville River, the Bureau of Land Management must, pursuant to 43 CFR 2650.5–1(b), determine whether the river is navigable and, if it is found navigable, must exclude the riverbed from the acreage to be charged against Kuugpik's entitlement.

The Board accordingly reverses the Bureau of Land Management decision herein appealed insofar as it fails to determine the navigability of the Colville River and insofar as its purports to charge against the acreage entitlement of Kuugpik Corp. the acreage of those submerged lands underlying the Nechelik Channel of the Colville River in

the absence of such a finding of navigability.

JUDITH M. BRADY,
Administrative Judge.

ABIGAIL F. DUNNING,
Administrative Judge.

APPEAL OF CHOGGIUNG, LTD.

3 ANCAB 325

Decided *August 17, 1979*

Appeal from a decision of the Bureau of Land Management AA–6659–A, AA–6659–B and AA–6659–C.

Reversed in part and remanded.

1. Alaska Native Claims Settlement Act: Land Selections: State Interests: Generally—Alaska Native Claims Settlement Act: Land Selections: Third-Party Interests—Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights

Inasmuch as the disputed gravel free use permits were transferred from one State agency, the Division of Lands, to another State agency, the Department of Highways, they do not constitute third-party interests protected as valid existing rights under § 14(g) of ANCSA.

APPEARANCES: Robert Wagstaff, Esq., Wagstaff & Middleton, on behalf of Choggiung, Ltd.; Thomas S. Gingras, Esq., on behalf of Bristol Bay Native Corporation; Martha Mills, Esq., Office of the Attorney General, on behalf of the State of Alaska; David S. Case, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

SUMMARY OF APPEAL

This appeal was brought by a Native Village Corporation, Choggiung, Ltd., and involves the issue of whether or not free use permits for gravel extraction issued by one State of Alaska agency to another State of Alaska agency are third-party interests constituting valid existing rights within the meaning of § 14(g) of the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 & Supp. I 1977).

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 & Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Pursuant to regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, the State Director or his delegate is the officer of the Bureau of Land Management, U.S. Department of the Interior, who is authorized to make decisions on land selection applications involving Native corporations under the Alaska Na-

tive Claims Settlement Act, subject to appeal to this Board.

PROCEDURAL BACKGROUND

On Jan. 27, 1978, the appellant filed a Notice of Appeal from a decision of the Bureau of Land Management (BLM) dated Dec. 28, 1977. The appellant objected to identification in the decision of the following four gravel free use permits as possible third-party interests, constituting valid existing rights, in the lands approved for conveyance to the appellant:

a. Free use permit, ADL 51371, to the State of Alaska, Department of Highways, located in W½ NE¼ section 12, T. 12 S., R. 56 W., Seward Meridian.
b. Free use permit, ADL 51372, to the State of Alaska, Department of Highways, located in NW¼ NE¼ section 12, T. 12 S., R. 56 W., Seward Meridian.
c. Free use permit, ADL 51373, to the State of Alaska, Department of Highways, located in NE¼ NE¼ section 13, T. 12 S., R. 56 W., Seward Meridian.
d. Free use permit, ADL 51379, to the State of Alaska, Department of Highways, located in NE¼ section 2, T. 12 S., R. 56 W., Seward Meridian; * * *

On Mar. 22, 1978, the Board issued an order suspending all briefing pending the reconsideration of Secretary's Order No. 3016, 86 I.D. 1 (Dec. 14, 1977), relating to the Department of the Interior's policy on valid existing rights. The result of the reconsideration was Secretarial Order No. 3029, 43 FR 55287 (Nov. 27, 1978). This Order held that if, prior to passage of ANCSA, lands which were tentatively approved for selection by the State of Alaska were (a) tentatively approved or patented by the State to municipalities or boroughs or (b) patented or leased by the State with an option to buy under the "open-to-entry" program, then valid existing rights were created under ANCSA. On December 4, 1978, the suspension was terminated and the parties were granted time within which to complete their briefing schedule.

On Jan. 17, 1979, at the request of the State of Alaska, this appeal was again suspended pending settlement negotiations. On May 11, 1979, a stipulation of settlement was filed; however, the agreement did not bear the signature of any person authorized to act on behalf of the appellant.

On May 18, 1979, a conference was held concerning the stipulation. As a result the Board issued an order dated May 22, 1979, adding the Native Regional Corporation, Bristol Bay Native Corporation, as a necessary party to this appeal; terminating all suspension orders; and granting the parties seven days to reach a settlement or otherwise establishing a briefing schedule. No settlement was forthcoming and briefs were subsequently filed by the appellant, the State of Alaska, and Bristol Bay Native Corporation. The Regional Solicitor's Office relied upon pleading previously filed on Dec. 22, 1978, asserting that it concurred with the appellant "* * * that the challenged free-use permits are not 'valid existing rights' within

the meaning of the Alaska Native Claims Settlement Act." No further briefing has been received in this appeal.

ASSERTIONS OF THE PARTIES

The appellant asserts that the disputed gravel free use permits, issued by the State to State agencies, are not third-party interests constituting valid existing rights within the meaning of § 14(g) of ANCSA, as interpreted by this Board in prior decisions or by the Secretary in Order No. 3029, *supra;* therefore, the permits should not have been identified as valid existing rights by BLM in the decision on appeal. Both the Regional Solicitor's Office, on behalf of BLM, and Bristol Bay Native Corporation concur with the appellant's position.

The State of Alaska, the only other party to this appeal, contends that these interests, though transferred from one State of Alaska agency to another, were created in the normal course of business just as any third-party interests would be, and are thus valid existing rights within the meaning of § 14(g) of ANCSA, properly so identified by BLM in its decision.

DISCUSSION

The lands in issue were tentatively approved to the State of Alaska on Dec. 23, 1963, following a general purposes grant selection filed by the State in 1961. On Dec. 18, 1971, these affected lands were withdrawn by § 11(a) (43 U.S.C. § 1610(a) (1976)) of ANCSA and subsequently selection applications were filed by the appellant pursuant to § 12(a) (43 U.S.C. § 1611(a) (1976)) of the Act. After tentative approval of the lands in the State, but before the effective date of ANCSA, the four gravel free use permits in question were issued by the Alaska Division of Lands to the Alaska Department of Highways for the extraction of gravel.

Sec. 11(a) of ANCSA, *supra*, enumerates the public lands which are withdrawn and available, "subject to valid existing rights," for selection by the Native corporations under the terms of the Act and § 11(a)(2) specifically states:

> All lands located within the townships described in subsection (a)(1) hereof that have been selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from the creation of third party interests by the State under the Alaska Statehood Act.

All parties to this appeal agree that the lands in issue were lands "* * * selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act." This being the situation, clearly the lands sought by the appellant in its original selection application were lands withdrawn and available for selection.

The only issue in this appeal is whether or not the four gravel free use permits issued by one State of

Alaska agency to another State of Alaska agency are third-party interests constituting valid existing rights within the meaning of § 14 (g) of ANCSA (43 U.S.C. § 1613 (g) (1976)) which provides in pertinent part:

> All conveyances made pursuant to this Act shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. * * *

This question has been previously decided by the Board, and the Board's ruling was not affected by Secretary's Order No. 3029, 43 FR 55287 (1978).

While the Secretary in Order 3029, *supra*, concluded that State grants of tentatively approved lands to municipal governments, or to individuals under the "open-to-entry" program, were valid existing rights, he did not discuss the status of permits issued by the State to its own agencies. Therefore, the Board's prior decision is dispositive of the issue.

In *Appeals of the State of Alaska & Seldovia Native Ass'n., Inc.*, 2 ANCAB 1, 84 I.D. 349 at p. 378 (1977) [ANCAB VLS 75–14/75–15], the Board found that State issued permits for resource use which were issued to third parties prior to December 18, 1971, were protected as valid existing rights. However, in the same decision the Board concluded:

> * * * the State cannot defeat Native selection rights by, in effect, setting itself up as a third party whose interests are protected. Congress clearly intended to make tentatively approved State selections within Native withdrawal areas available for Native selection in total amounts up to 69,120 acres. Transfer by the State of a permit to extract natural resources from one State agency to another does not place the State in a position of a protected third party. When an interest in land selected by and tentatively approved to the State of Alaska was transferred from the State Division of Lands to the State Division of Aviation, the complete interest in the land remained in the State of Alaska and therefore remained subject to the withdrawal and selection provision of secs. 11(a) and 12 of ANCSA. The State of Alaska's interest in lands previously selected and TA'd to the State, which fall within the withdrawal areas described in secs. 11(a)(1) and (2) of ANCSA, are withdrawn for selection by Native Corporations by secs. 11(a)(1) and (2) of ANCSA and do not constitute valid existing rights within the meaning of secs. 11(a) or 14(g) of ANCSA. [84 I.D. 378]

[1] Inasmuch as the disputed gravel free use permits were transferred from one State agency, the Division of Lands, to another State agency, the Department of Highways, they do not constitute third-party interests protected as valid existing rights under § 14(g) of ANCSA. The State's entire interest in these tentatively approved lands

was available for selection by the appellant and the Bureau of Land Management erred in identifying the four permits as possible third-party interests constituting valid existing rights within the meaning of § 14(g) of ANCSA.

ORDER

In accordance with the foregoing decision, this appeal is hereby Ordered remanded to the Bureau of Land Management with the instruction that the lands in issue be conveyed to the appellant absent any identification of the four gravel free use permits in issue. Relief sought by the State of Alaska regarding guidance on the payment of revenues to the regional corporations is denied as an issue beyond the jurisdiction and function of the Board.

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
Administrative Judge.

ABIGAIL F. DUNNING,
Administrative Judge.

LAWRENCE MATSON,
Administrative Judge.